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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner

V.

W. J. ESTELLE, JR.,

Respondent

On Petitioner's Motion For Stay Of Execution

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION

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ATTORNEYS FOR RESPONDENT

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Respondent herein, and submits this his response to Petitioner's motion for stay of execution, which is presently scheduled for sometime before sunrise on January 25, 1983, in Huntsville, Texas.

I.

NATURE OF THE CASE

Petitioner Thomas A. Barefoot is scheduled to be executed sometime before sunrise on January 25, 1983, at the Texas Department of Corrections in Huntsville, Texas. On November 12, 1982, a federal district court denied Petitioner's application for writ of habeas corpus filed pursuant to 28 U.S.C. §2254. After notice of appeal was filed on November 24, 1982, the district court vacated its previously entered stay of execution on December 8, 1982, and granted a certificate of probable cause to appeal on December 13, 1982. After hearing oral argument on January 19, 1983, a panel of the United States Court of Appeals for the Fifth Circuit unanimously denied a stay of execution. The matter is now before the Court on Petitioner's motion.

Respondent submits this response without having viewed Petitioner's motion in this Court. Presumably he raises those matters raised in the court below. Essentially Respondent relies upon the response he filed in the Court of Appeals, which is attached hereto as Appendix, hereinafter "App." He also relies upon the same appendicies before the Court of Appeals, Apps. A-E, which are also attached hereto. Respondent has arranged for the Court of Appeals to deliver to the office of the Clerk of this Court a copy of the sixteen page opinion of the Court of Appeals. It should be delivered on the morning of January 21, 1983. Finally, Respondent submits as App. G one copy of the transcript of the evidentiary hearing conducted in this cause by the federal district court on July 28, 1982.

II.

PROCEDURAL HISTORY

Petitioner was convicted of the murder of a police officer. The crime was committed on August 8, 1978, and Petitioner was convicted on November 14, 1978. The Texas Court of Criminal Appeals affirmed the judgment of conviction on June 2, 1980, and this Court denied a petition for writ of certiorari on June 29, 1981.

Since then, Petitioner has raised his claims and relief was denied by the state habeas corpus convicting court on October 6, 1981, and by the Texas Court of Criminal Appeals on the same day. His second and third state habeas corpus applications were denied by the Texas Court of Criminal Appeals on December 21, 1982, and January 11, 1983, respectively.

A more detailed statement of the procedural history of the case appears in Apps. A, F, as well as in the opinion of the Court of Appeals below.

III.

STATEMENT OF FACTS

Two excellent, detailed statements of the state's case against Petitioner are available to the Court. The Court of Criminal Appeals summarized the important evidence in Barefoot v. State, 596 S.W.2d 875, 878-80 (Tex.Crim.App. 1980) (App. B). The state's answer in Petitioner's first state habeas corpus application also discussed the evidence against Petitioner (App. D at 1-8), as did the opinion of the Court of Appeals below.

Essentially, Petitioner told witnesses before he committed the crime the precise manner in which he was going to commit it; a witness carried him to the scene of the crime with the necessary implements in hand; he was positively identified near the scene of the crime; he admitted committing the crime to other witnesses afterwards; he quickly fled from Kileen, Texas, to Houston, Texas; and when he was arrested in Houston, he bore a gun in his back pocket that a ballistics expert testified was the same gun that fired the bullet that killed the police officer in this case.

At the punishment stage of Petitioner's bifurcated trial, the state presented, among other things, two psychiatrists. Neither had ever interviewed Petitioner, but testified upon the basis of hypothetical questions that the hypothetical person described in the hypotheticals, within reasonable psychiatric certainty, in the future would commit criminal acts of violence that would constitute a continuing threat to society. Under Tex. Code Crim. Proc. Ann. art. 37.071, the jury was required to find such a probability

before a sentence of death could be returned.

IV.

PETITIONER'S CLAIMS

Preliminary Matters

Petitioner has been granted a certificate of probable cause to appeal. This does not entitle him to an automatic stay of execution, however, as the Court agreed in Brooks v. Estelle, 51 U.S.L.W. 3469 (U.S., Dec. 6, 1982). The Court of Appeals so held, reasoning that this Court's cases cited by the dissenters in Brooks v. Estelle, supra, stand for the proposition that Petitioner is entitled only to a careful, reasoned disposition of the merits of his claims, after opportunity to brief those claims. The opinion of the Court of Appeals below reflects precisely such careful consideration, albeit in the procedural context of a motion to stay execution.

The parties have agreed that in that context, Petitioner is entitled to a stay of execution if he can demonstrate a reasonable judicial doubt about the outcome of any of the issues he would present during his full appeal. If he cannot create such a doubt, then the outcome of such an appeal is a fore-ordained conclusion, and the useless futility of a full appeal would be demonstrated.

Petitioner's Claims

1. Petitioner first argues that under state law, the state convicting court was without jurisdiction on December 20, 1982, when it sentenced him to be executed on January 25, 1983, because on December 20, his application for writ of habeas corpus was pending in the federal courts. The Court of Appeals below correctly stated that this is purely a matter of state law and that the issue was specifically rejected by the Texas Court of Criminal Appeals in Petitioner's state habeas corpus application filed and denied on December 20, 1982. One member of the panel in the Court of Appeals, Judge Randall, was the author of a recent opinion extensively discussing the Texas habeas corpus abstention doctrine relied upon by Petitioner. See, Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982). The court held that it has no arguable application

to Petitioner's circumstances.

2. The Court of Appeals found no merit in Petitioner's claim that he was deprived of due process of law by the use of hypothetical questions posed to psychiatric experts at the punishment phase of his bifurcated trial. There is no violation of Estelle v. Smith, 451 U.S. 454 (1981), since neither of these psychiatrists had examined Petitioner. The psychiatrists instead predicted future dangerousness of a hypothetical defendant, based upon a lengthy hypothetical question asked by the prosecutor.

The Court of Appeals found that the accuracy of predictions of future dangerousness is established where there is a pattern of repetitive assaultive conduct, as in Petitioner's case. The court noted that all four experts who testified in the evidentiary hearing in federal district court -- none of which testified at Petitioner's trial -- agreed with the conclusion, based upon the same hypothetical question, reached by the psychiatrists who testified at Petitioner's trial. They disagreed only as to their degree of certainty of that conclusion. (App. G at 21-22, 43-44, 72-73, 117, 189-91, 204, 231-33).

The Court of Appeals found that Petitioner's argument that the hypothetical question deprived him of fundamental fairness because it failed to include mitigating circumstances was without merit because Petitioner's counsel were free upon cross-examination to ask a hypothetical question that included such circumstances. The Court of Appeals noted that this Court has approved the use of psychiatric testimony in the Texas capital punishment sentencing process in Jurek v. Texas, 428 U.S. 262, 275-76 (1976), and Estelle v. Smith, 451 U.S. 454, 473 (1981). Finally, the Court of Appeals noted that the rule contended for by Petitioner would effectively prevent the state from ever presenting psychiatric testimony at his trial, even in rebuttal of Petitioner's psychiatric testimony.

3. Petitioner raised a claim for the first time federally in the Court of Appeals that a witness at his trial, Mary Richards, had committed perjury and that the prosecutor had aided such perjury. Petitioner relied upon a deposition of Richards that he took on December 27, 1982.

Richards at trial testified that a few moments after she heard two shots, she looked out her window, at some distance from the scene of the crime, and saw a man running that resembled Petitioner, although she could not positively identify him. At the deposition she states her present opinion that her trial testimony was untrue because in fact, she knew the man she saw was not Petitioner. She contends that she testified as she did because agents of the prosecutor frightened her by telling her that Petitioner had threatened her.

It is fair to say that the Court of Appeals concluded that it is impossible not to doubt Richards's statements at her recent deposition. She was a minor witness in the case; no rational prosecutor would have troubled himself with calling a witness whose alleged testimony might jeopardize the entire prosecution.

Even assuming as true Petitioner's claim that Richards's testimony was perjured, and that the prosecution was guilty of misconduct in allowing such testimony to take place, the Court of Appeals concluded that her testimony was not material to the state's case under the standard set forth in Smith v. Phillips, ___ U.S. ___, 102 S.Ct. 940 (1982), and United States v. Agurs, 427 U.S. 97 (1976). Respondent argued in the court below that whether to grant a stay upon this issue should hinge upon whether the panel, after due consideration, held a reasonable judicial doubt that Richards's changed testimony could possibly have affected the jury's verdict, in light of the overwhelming evidence of guilt. The Court of Appeals concluded that it held no such doubt. Respondent suggests

that the evidence allows for no other conclusion.

On the afternoon of January 20, 1983, the undersigned attorney for Respondent was informed by the office of the Clerk, United States District Court for the Western District of Texas, that the federal district court in this case, having been informed that Petitioner intends to file a new federal habeas corpus application on January 21, 1983, has set the matter for an evidentiary hearing on January 24, 1983, in El Paso, Texas. The factual dispute underlying this claim may be determined at that time. If Petitioner re-raises this claim, as anticipated, Respondent will present several witnesses, as well as other evidence, to refute the contention that the prosecution in this case engaged in any impermissible conduct whatsoever. Even though the Court of Appeals has found that the allegedly perjurious conduct is as a matter of law immaterial under the applicable standard, Respondent welcomes the opportunity to dispel any serious suggestion that the prosecution in this case engaged in misconduct. If the district court entertains a reasonable doubt as to that matter after hearing this evidence, however, he will be in the best position to judge whether a stay of execution should be granted pending further evidentiary development.

V.

CONCLUSION

The infliction of the death penalty upon a member of society is an awesome act of great gravity. It is one that should be undertaken only after the federal and state courts have reviewed the merits of all of Petitioner's claims and found them to be insubstantial. Petitioner has received such review in this case. The Texas Legislature has promulgated the death penalty that will be applied in this case. This Court has upheld it. Numerous state and federal courts have found Petitioner's trial to be free of constitutional infirmity. The time comes in such a case to enforce the law. Respondent respectfully suggests that that time has now arrived.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DOUGLAS M. BECKER
Assistant Attorney General
Acting Chief, Enforcement Division

Douglas M. Becker
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ATTORNEYS FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that on the 20th day of January, 1983, one copy of Respondent's Response to Petitioner's Motion for Stay was sent by Federal Express to Mr. Will Gray and Ms. Carolyn Garcia, Attorneys at Law, 2038 Lexington Street, Houston, Texas 77098. All parties required to be served have been served. I am a member of the Bar of this Court.

Douglas M. Becker
DOUGLAS M. BECKER
Assistant Attorney General

I declare under penalty of perjury that the above is true and correct.

January 20, 1983

Douglas M. Becker
DOUGLAS M. BECKER
Assistant Attorney General